Supreme Court U.S.
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No. _____

In The

Supreme Court of the United States

ROBERT NARVELL CARNAHAN,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Were Petitioner's Due Process rights under the Fourteenth Amendment of the United States Constitution violated when the Texas courts held that he forfeited his right to a competency inquiry when there is no evidence that he was found to be competent after the trial court had ordered a pre-trial psychiatric evaluation?

Should this Honorable Court apply its established jurisprudence of indulgence of every reasonable presumption against waiver of fundamental constitutional rights in this case when the trial court had a bona fide doubt of Petitioner's competency to stand trial and there is no evidence that Petitioner made an intentional relinquishment of the right to a competency inquiry?

PARTIES TO THE PROCEEDING

ROBERT NARVELL CARNAHAN, Petitioner

HONORABLE CARLOS VALDEZ, District Attorney of Nueces County, Texas

HONORABLE DOUGLAS K. NORMAN, Assistant District Attorney of Nueces County, Texas, Criminal Appellate Attorney

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CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

Robert Narvell Carnahan v. The State of Texas, 2005 Tex. App. LEXIS 4262 (Tex.App. – Corpus Christi 2004, pet refused, 2006 Tex. Crim. App. LEXIS 31 (Tex. Crim. App., Jan. 18, 2006) Appendix App. 1. Unpublished opinions.

BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals of Texas, Thirteenth District, Corpus Christi, entered the unpublished, memorandum opinion and judgment at issue on June 2, 2005. All filings in the lower appellate court were timely.

On October 6, 2006, Petitioner filed a timely Petition For Discretionary Review with the Texas Court of Criminal Appeals. Appendix App. 38. The present petition is timely filed under 28 U.S.C. §2101(d) and under Rule 13.1 of this Honorable Court as the discretionary review by the Texas Court of Criminal Appeals was refused on January 18, 2006. Appendix App. 38. Thus, Petitioner seeks review of the lower appellate court by writ of certiorari.

CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

Constitution of the United States, Amendment XIV, Due Process Clause.

STATEMENT OF THE CASE

Petitioner is now 77 years of age. He was convicted in the 347th district court of Nueces County, Texas of sexual offenses under the Texas Penal Code against his step-daughters. The indictment upon which Petitioner's convictions were based, was returned on November 29, 2001, stating offenses that started in November of 1993 and which were first communicated in 2001 during a bitter divorce proceeding between Petitioner and his ex-wife.

Petitioner received a sentence of 40 years on January 10, 2003. Thus, if relief is not granted, Petitioner, who has no previous criminal convictions, will spend the rest of his life in prison.

In a pre-trial hearing, on August 12, 2002, the trial court made a finding that Petitioner should be examined by a psychiatrist or psychologist to determine if he was competent to stand trial. Appendix App. 5.

The trial transcript demonstrates in the court of first instance when the basis for the federal question involved was first brought to the attention of the trial judge. Right after evidence of the lack of Petitioner's competency to stand trial was presented to the trial court, the Hon. Joaquin Villarreal, the trial court made the following ruling[1] to which the Respondent concurred:

> Judge Villarreal: " . . . I have to psych him [Petitioner] or I'm gonna be reversed . . . "
> [R.R. Vol. 2, p. 38, line 8].

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[1] R.R. [Reporter's Record] is the transcript of proceedings in the trial court transcribed by the Official Court Reporter.

> Judge Villarreal: " . . . I'm gonna have him [Petitioner] psyched . . . " [R.R. Vol. 2, p. 38, line 21].

The trial transcript, shortly thereafter, demonstrates that Respondent concurred with the trial court that there was evidence that Petitioner lacked the requisite competency to stand trial:

> Ms. Gail Gleimer: [Assistant District Attorney]: Judge, this motion says he requests Dr. Capitain to do it. Can I go ahead an (sic) call the office and see if he can do it today or tomorrow, immediately?
>
> Judge Villarreal: Doctor Capitain will be my first choice. Contact him and see how soon he can do it. [R.R. Vol. 2, p. 39, lines 22-25; p. 40, lines 1-3].

It is undisputed that there was no competency hearing or inquiry concerning Petitioner's competency to stand trial. It is further undisputed that Petitioner never waived his right to a competency inquiry or hearing.

The Thirteenth Court of Appeals recognized that Petitioner raised a federal constitutional question concerning the lack of a hearing or inquiry concerning his competency wherein the lower Court states:

> " . . . In both Texas and the federal system, 'it has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.' *McDaniel v. State*, 98 S.W.3d 704, 709 (Tex.Crim.App. 2003). The conviction of an accused person while he is legally incompetent

> violates the due process. *Id.* Thus, to protect a criminal defendant's constitutional rights, a trial court must inquire into the accused's mental competence once the issue is sufficiently raised. *Id.*" Appendix App. 2.

To support this statement the Court cited *McDaniel v. State*, 98 S.W.3d 704, 709 (Tex.Crim.App. 2003). At this point, this Honorable Court might inquire as to the location of the federal question. The above quote from the Thirteenth Court of Appeals was a verbatim quote from the Court of Criminal Appeals in *McDaniel, supra*.

The lower appellate court omits the reference by the Texas Court of Criminal Appeals to relevant decisions of this Honorable Court.

Thus, the quote from the Court of Criminal Appeals by the lower appellate court omitted the Supreme Court decisions relevant to this case. This is correctly shown by referring to the exact statement by the Court of Criminal Appeals:

> " . . . In both Texas and the federal system, 'it has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."[10] The conviction of an accused person while he is legally incompetent violates due process.[11] Thus, to protect a criminal defendant's constitutional rights, a trial court must inquire into the accused's mental competence once the issue is sufficiently raised . . . ".[12]
> *McDaniel v. State*, 98 S.W.3d 704, 709 (Tex.Crim.App. 2003).

[10] *Drope v. Missouri*, 420 U.S. 162, 171, 43 L. Ed. 2d 103, 95 S. Ct. 896 (1975).

[11] *Pate v. Robinson*, 383 U.S. 375, 378, 15 L. Ed. 2d 815, 86 S. Ct. 836 (1966); *Lopez v. State*, 909 S.W.2d 512, 514 (Tex. Crim. App. 1995).

[12] *Pate v. Robinson*, 383 U.S. at 385.

Thus, a federal question is clearly recognized by the court of last resort in Texas on questions of criminal law.

REASONS FOR GRANTING THE PETITION

The Texas Court of Criminal Appeals is the Texas Court of last resort on questions of criminal law. It has refused to review the lower appellate court's finding that the trial court had no duty to conduct at least a competency inquiry after the trial court had ordered that Petitioner undergo a competency examination after receiving evidence of incompetency. Both courts have recognized that Petitioner has presented a federal question.

Petitioner was forced to undergo trial without a competency evaluation. This was a violation of his rights to due process under the Fourteenth Amendment of the United States Constitution. In its refusal to reverse the inferior appellate court, the Court of Criminal Appeals, by default, decided an important federal question in a way that conflicts with relevant decisions of this Honorable Court.

In addition, there is now pending on this Honorable Court's docket Cause No. 05-5966, *Clark v. Arizona*, which is set for oral argument on April 19, 2006. Although these

issues involve the test of insanity as a defense to an offense, it certainly involves related due process issues pertaining to the instant case's issues of competency to stand trial. Thus, the granting of this Petition for Certiorari would foster an efficiency of judicial resources as the issues of the instant case and the *Clark v. Arizona* case would overlap. Thus, if this Honorable Court were to grant this Petition the result would be consistency in the law of insanity or mental disease or defect as a defense to crime and also consistency in the related issue of competency to stand trial.

ARGUMENT TO SUPPORT GRANTING THE PETITION

THE DECISION OF THE TEXAS COURT OF CRIMINAL APPEALS FAILS TO FOLLOW OPINIONS OF THE SUPREME COURT.

AN INCOMPETENT DEFENDANT CANNOT KNOWINGLY WAIVE A COMPETENCY INQUIRY

In the instant case a judicial determination had been made ordering a "psychiatric examination". Appendix App. 5.

The lower appellate court found that Petitioner did not object to the trial court's proceeding with the trial and that he testified at his trial. Appendix App. 5. They concluded that Petitioner forfeited any purported error because he failed to object to the trial court's proceeding to trial. Appendix App. 6.

This holding directly contradicts this Court's holding in *Pate v. Robinson* that:

> " . . . it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial . . . " 383 U.S. 375, 384

As Petitioner has pointed out, the trial court must have entertained a bona fide doubt concerning Petitioner's competency or he would not have ordered a competency examination. The lower appellate court is in error in stating that:

> " . . . [Petitioner's] motion merely requested an examination to determine competency; it did not specifically assert that he was incompetent . . . " Appendix App. 6.

The lower appellate court's finding is directly contradicted by its earlier recitation of the evidence where it quoted the relevant part of the affidavit of Petitioner's original trial counsel as follows:

> "(4) [Petitioner's] conduct "indicates an irrational lack of understanding of the proceedings against him and the uncontroverted facts surrounding the charges against him," and (5) [Petitioner] lacked "sufficient present ability to consult and assist in his defense." Appendix App. 5.

It is true that in *Pate v. Robinson*, *supra*, this Court points out that counsel throughout the proceedings insisted that the accused's present sanity was very much in issue. 383 U.S. 375, 384.

In this case the question of Petitioner's competence to stand trial was not raised again until post trial proceedings

in his Motion for New Trial, filed by the undersigned counsel for Petitioner. Appendix App. 6. However, the instant case presents a much more severe question than the scenario in *Pate*. At least in *Pate* there is a record whereby this Court could determine if there was evidence in Robinson's behalf which entitled him to a hearing on the competency issue where the trial judge refused to make a competency inquiry. 383 U.S. 375, 385. In the instant case, after the trial court orders a psychiatric examination of Petitioner, the record is devoid of any such examination. There is no evidence of Petitioner's competency. The trial judge, even at the hearing on the Motion for New Trial makes no findings as to competency.

Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960) is apposite to the instant case.

In the instant case there is insufficient evidence to support any finding that Petitioner was competent to stand trial; a psychiatric examination of Petitioner is ordered. He then proceeds to trial, is given a 40 year sentence without any evidence in the record whatsoever of his competency to stand trial. Petitioner's Motion for New Trial on the competency issue was overruled in spite of the fact of an affidavit of one of his trial investigators which was admitted into evidence at the new trial hearing. It was relevant in time to the issue of competency. Appendix App. 39-41. It states in relevant part:

> " . . . From my personal experience and based upon my observation of various relatives which have undergone similar types of treatment, it is my belief and opinion, based upon my experience as an investigator and my own knowledge of these types of illnesses, which was really focused by me when I viewed his medical records, that Mr.

> Carnahan's medical history would be consistent with his not being able to think clearly and would have adversely effected his memory. It was clearly obvious from my observation that when I first started seeing him in August, 2002, he should have been examined by a medical doctor. When I saw the records from Spohn Hospital, I could then clearly realize why it had been difficult for me to obtain information from him." Appendix App. 40.

The Texas courts are in error by basing their holding that Petitioner forfeited any "purported" error because his subsequent trial counsel testified that they made the decision not to pursue the competency issue. Appendix App. 6. There is no evidence of Petitioner's competency subsequent to the order for psychiatric examination. Further, the trial court made no findings concerning Petitioner's competence at the New Trial hearing despite having ample opportunity to observe Petitioner's demeanor.

This Honorable Court has held that there is a constitutional limit on waiver of fundamental constitutional rights. *U.S. v. Mezzanatto,* 513 U.S. 196, 204, 115 S. Ct. 797, 130 L. Ed. 2d 697 (1995).

The waiver standards set forth in *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938), overruled in part on other grounds by *Edwards v. Arizona*, 451 U.S. 477, 464, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981). apply to this case.

In conclusion, this Honorable Court should grant this Petition for Certiorari because there is no evidence that any inquiry or findings were made by the trial court pertaining to Petitioner's competency to stand trial. Thus, this case certainly is governed by the indulgence engaged in by this Honorable Court on the issue of whether fundamental

constitutional rights have been raised as set forth in *Michigan v. Jackson*, 475 U.S. 625, 629, 89 L. Ed. 2d 631, 106 S. Ct. 1404 (1986) wherein this Court stated that:

> "... we should indulge every reasonable presumption against waiver of fundamental constitutional rights." *Jackson*, 475 U.S. at 633, quoting *Johnson*, 304 U.S. at 464. "Doubts must be resolved in favor of protecting the constitutional claim." *Jackson,* 475 U.S. at 633.

Further, the trial court made no findings concerning Petitioner's competence at the New Trial hearing despite having ample opportunity to observe Petitioner's demeanor throughout these proceedings. It is submitted that this is a forceful reason for this Court to presume against Petitioner's waiver of his due process right not to be tried while incompetent. Respondent should not lie behind the log of presumed competency when there is no evidence of same when there is no compliance with an order for a psychiatric evaluation.

For these reasons, as Petitioner has shown that a valid federal question was improperly decided by the Texas Court of Criminal Appeals, Petitioner's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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April 17, 2006

2005 WL 1313428

ROBERT NARVELL CARNAHAN, Appellant, v. THE STATE OF TEXAS, Appellee.

NUMBER 13-03-155-CR

COURT OF APPEALS OF TEXAS, THIRTEENTH DISTRICT, CORPUS CHRISTI

2005 Tex. App. LEXIS 4262

June 2, 2005, Memorandum Opinion Delivered June 2, 2005, Filed

COUNSEL: For APPELLANT: Sam Westergren, ATTORNEY at LAW, Corpus Christi, TX.

For STATE: Carlos Valdez, NUECES COUNTY DISTRICT ATTORNEY, Douglas K. Norman, ASSISTANT DISTRICT ATTORNEY, Corpus Christi, TX.

JUDGES: Before Justices Hinojosa, Yanez and Castillo. Memorandum Opinion by Justice Castillo.

OPINION BY: ERRLINDA CASTILLO

OPINION: MEMORANDUM OPINION

Memorandum Opinion by Justice Castillo

The indictment charged appellant Robert Narvell Carnahan with thirteen counts of various sexual offenses against his minor stepdaughters.[1] A jury returned a guilty verdict on all counts and assessed punishment at fifteen

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[1] The two minor children were identified by pseudonyms "110194-010183" and "100195-042984." For ease of reference, we adopt Carnahan's use of "older stepdaughter" and "younger stepdaughter," respectively.

years for each count of indecency[2] and sexual assault,[3] and forty years for each count of aggravated sexual assault.[4] Carnahan presents twenty-four issues on appeal. We address these *seriatim*.

I. COMPETENCY

A. Inquiry or Hearing

By his first issue, Carnahan argues that the trial court had the duty to conduct a competency inquiry and hearing. The State responds that Carnahan waived error because defense counsel did not pursue competency or, alternatively, the evidence presented failed to raise the issue.

In both Texas and the federal system, "it has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *McDaniel v. State*, 98 S.W.3d 704, 709 (Tex. Crim. App. 2003). The conviction of an accused person while he is legally incompetent violates due process. *Id.* Thus, to protect a criminal defendant's constitutional rights, a trial court must inquire into the accused's

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[2] *See* Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 1.01, sec. 21.11, 1993 Tex. Gen. Laws 3586, 3616, *amended by* Act of May 23, 2001, 77th Leg., R.S., ch. 739, 2001 Tex. Gen. Laws 1463, 1464 (current version at TEX. PEN. CODE ANN. § 21.11(a)(1) (Vernon 2003)).

[3] TEX. PEN. CODE ANN. 22.011(f) (Vernon 2003).

[4] *See* Act of May 26, 1999, 76th Leg., R.S., ch. 417, § 2, 1999 Tex. Gen. Laws 2752, 2753, amended by Act of May 15, 2001, 77th Leg., R.S., ch. 459, § 5 (current version at TEX. PEN. CODE ANN. § 22.021 (Vernon Supp. 2004-05)).

mental competence once the issue is sufficiently raised. *Id.* These due process standards are built into the Texas Code of Criminal Procedure. *Id.*; *see* TEX. CODE CRIM. PROC. ANN. art. 46B.001-.171 (Vernon Supp. 2004-05) (*formerly codified at* TEX. CODE CRIM. PROC. ANN. art. 46.02 (Vernon 1979)).[5]

Former article 46.02 section 1A(a) provided that "[a] person is incompetent to stand trial if the person does not have: (1) sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding; or (2) a rational as well as a factual understanding of the proceedings against the person." Act of June 14, 2001, 77th Leg., R.S. ch. 828, §§ 3, 4, 2001 Tex. Gen. Laws 1650, 1652, *repealed by* Act of May 14, 2003, 78th Leg., R.S. ch. 35, §§ 15, 16, 2003 Tex. Gen. Laws 57, 72 (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.001-.171 (Vernon Supp. 2004-05)). Former article 46.02 section 2 provided:

> (a) The issue of the defendant's incompetency to stand trial shall be determined in advance of the trial on the merits if the court determines there is evidence to support a finding of incompetency to stand trial on its own motion or on written motion by the defendant or his counsel filed prior to the date set for trial on the merits asserting that the defendant is incompetent to stand trial.

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[5] Article 46.02 has been repealed and does not apply to proceedings commenced after January 1, 2004. Act of May 14, 2003, 78th Leg., R.S. ch.35 §§ 15, 16, 2003 Tex. Gen. Laws 57, 72. Because the proceedings in the instant case commenced prior to January 1, 2004, we will refer to article 46.02 TEX. CODE CRIM. PROC. ANN. art. 46.02 (Vernon 1979).

> (b) If during the trial evidence of the defendant's incompetency is brought to the attention of the court from any source, the court must conduct a hearing out of the presence of the jury to determine whether or not there is evidence to support a finding of incompetency to stand trial.

The difference between section 2(a) and section 2(b) is the timing. *McDaniel*, 98 S.W.3d at 710. In section 2(a), the issue of competency is raised before trial, while under section 2(b), the issue of competency is first raised at some point during the trial. *Id.* Thus:

> (1) if a competency issue is raised by the defendant, any party, or the court; and
>
> (2) evidence of incompetency is brought to the attention of the trial court by the defendant, any party, or the court;
>
> (3) of the type to raise a bona fide doubt in the judge's mind regarding the defendant's competency to stand trial; then
>
> (4) the judge must conduct a Section 2 "competency inquiry" to determine if there is some evidence sufficient to support a finding of incompetence, and if there is,
>
> (5) the judge must impanel a jury for a Section 4 "competency hearing."

See McDaniel, 98 S.W.3d at 710-11. The requirements of each step must be fulfilled before moving on to the next. *Id.* at 711.

A defendant is presumed competent to stand trial and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence. Act of June 14, 2001, 77th Leg., R.S. ch. 828, §§ 3, 4, 2001 Tex.

Gen. Laws 1650, 1652 (repealed 2003). Whether an issue of incompetency exists at trial is left to the discretion of the judge. *Ainsworth v. State*, 493 S.W.2d 517, 521 (Tex. Crim. App. 1973). A section 2 or "competency" inquiry is required only if the evidence brought to the judge's attention raises a bona-fide doubt in the judge's mind about the defendant's competency to stand trial. *McDaniel*, 98 S.W.3d at 710.

In this case, Carnahan's original defense counsel moved for a competency examination by an expert because "[t]here is an issue regarding whether [Carnahan] is 'competent' to stand trial." Defense counsel's affidavit filed in support of the motion states that (1) he knew Carnahan for ten years, (2) Carnahan was a lawyer with above average skill and intelligence, (3) Carnahan's conclusion that a document was exculpatory (when according to counsel it was not) "alone raises in [counsel's] mind the question of incompetency," (4) Carnahan's conduct "indicates an irrational lack of understanding of the proceedings against him and the uncontroverted facts surrounding the charges against him," and (5) Carnahan lacked "sufficient present ability to consult and assist in his defense." The defense argued the motion at a pre-trial hearing, reasserting the statements in the affidavit. The trial court ordered a psychiatric examination.[6] At the same hearing, the trial court granted defense counsel's motion to withdraw based on his lack of experience in criminal cases.

Further proceedings on the competency issue did not occur. Carnahan did not object to the trial court's proceeding with the trial. He testified at trial. During post-trial

[6] The record does not contain a written order to this effect.

proceedings, both trial counsel, appointed after the withdrawal of initial counsel, testified they made the decision not to pursue the competency issue.

Carnahan essentially argues that his motion and the trial court's ruling were sufficient to require further competency proceedings before trial. We conclude he forfeited any purported error because he failed to object to the trial court's proceeding to trial. *McDaniel*, 98 S.W.3d at 711. Even assuming Carnahan preserved error, on this record, we cannot conclude the trial court abused its discretion. Under the former article 46.02 section 1A(b), the evidence adduced did not overcome the presumption of competency. *See* Act of June 14, 2001, 77th Leg., R.S. ch. 828, §§ 3, 4, 2001 Tex. Gen. Laws 1650, 1652 (repealed 2003). Carnahan's motion merely requested an examination to determine competency; it did not specifically assert that he was incompetent. *See McDaniel*, 98 S.W.3d at 711. The trial court granted the relief requested. We overrule Carnahan's first issue.

B. Motion for New Trial

By his second and third issues, Carnahan argues the trial court erred in overruling his motion for new trial because (1) he did not waive his competency issue, and (2) he presented sufficient evidence for a jury to determine competence.

In criminal cases, there is no common law right to a new trial. *Banks v. State*, 79 Tex. Crim. 508, 186 S.W. 840, 841 (Tex. Crim. App. 1916). The right is purely statutory. *Id.*; *see Drew v. State*, 743 S.W.2d 207, 223 (Tex. Crim. App. 1987) (en banc); *see also* TEX. R. APP. P. 21.2. The trial court is granted wide latitude in exercising the decision to

grant or deny a motion for new trial, and in the absence of an abuse of discretion, an appellate court should not reverse. *Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995).

Even assuming the evidence was sufficient to raise the issue of competency, Carnahan did not fulfill the requirements of each of the *McDaniel* steps because he did not submit to the psychiatric examination ordered. *See McDaniel*, 98 S.W.3d at 710-11. A mere assertion of incompetency, unsupported by any facts or evidence, is not sufficient to require a "competency inquiry" under section 2a or a "competency hearing" under section 4. *See id.* at 711. On this record, we conclude the trial court did not abuse its discretion in denying the motion for new trial. We overrule the second and third issues presented.

II. PSEUDONYMS

By his fourth and fifth issues, Carnahan argues that the trial court erred in applying pseudonyms to the victims because the use tainted the presumption of innocence and denied him a fair trial. The State counters that the use of pseudonyms to identify victims is statutory and that Carnahan waived error.

A victim may choose to use a pseudonym instead of his or her name in all public files and records concerning the offense, including police summary reports, press releases, and records of judicial proceedings. TEX. CODE CRIM. PROC. ANN. art. 57.02(b) (Vernon Supp. 2004-05); *see also Greeno v. State*, 46 S.W.3d 409, 413 (Tex. App.-Houston [14th Dist.] 2001, no pet.). A victim who elects to use a pseudonym must complete a pseudonym form developed under this article and return the form to the investigating

law enforcement agency. TEX. CODE CRIM. PROC. ANN. art. 57.02(b) (Vernon Supp. 2004-05). Article 57.02(f) requires that the prosecutor use the pseudonym "in all legal proceedings concerning the offense." TEX. CODE CRIM. PROC. ANN. art. 57.02(f) (Vernon Supp. 2004-05). The trial court may be permitted to disclose the victim's legal name, but only if the court finds that information to be essential in the trial of the offense, or the identity of the victim is in issue. TEX. CODE CRIM. PROC. ANN. art. 57.02(g) (Vernon Supp. 2004-05).

Carnahan complains in particular about the conditions the trial court imposed on the use of pseudonyms during trial. He argues that the trial court's comments regarding this use "brought undue attention to their [the complainants'] version of the facts so as to rebut the presumption of innocence." The only reference to the record points us to the following trial court statement:

> THE COURT: I'm gonna let you use names, so how are you harmed? You want names, you can get to use names. But, me, what I'm gonna do is try to safeguard it not leave this room. You need the names to leave this room?
>
> [DEFENSE COUNSEL]: No.

By enacting article 57.02 and changing the manner in which the victim may be identified in an indictment, the Legislature sought to satisfy two competing interests: the defendant's due process right to notice of the offense for which he was indicted; and the victim's interest in avoiding the embarrassment associated with a public pronouncement of the details of the alleged offense. *Stevens v. State*, 891 S.W.2d 649, 651 (Tex. Crim. App. 1995) (en banc). We conclude the trial court's conditions were consistent with

legislative intent. Carnahan received notice of the offense, including the identity of his accusers, and the accusers' names were protected from public disclosure. *See id.* The record does not reflect that the trial court's conditions exceeded the scope of its statutory authority.[7] We overrule the fourth and fifth issues presented.

III. LIMITING CROSS-EXAMINATION

By his sixth and seventh issues, Carnahan argues the trial court violated his confrontation right by severely limiting his cross-examination of two State's witnesses regarding (1) behavioral characteristics of his stepdaughters, and (2) the younger stepdaughter's sexual history. The State responds, in part, that error, if any, is harmless.

Carnahan points first to the trial court's ruling precluding the defense from questioning his ex-wife about his stepdaughters' trophies and achievements. The trial court sustained the State's relevancy objection and requested the defense to present persuasive authority to allow the question. Outside the jury's presence, the defense argued that the "particular response that I was looking for, was that they would be unable to feel any pride of accomplishment." The question was one in a "list of behaviors that . . . basically, describe what people do when things happen."[8]

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[7] The record reflects that, at one point, the prosecutor objected to a witness's use of the numerical pseudonyms on direct examination by the State and apologized. On the prosecutor's motion, the trial court struck the references from the record.

[8] The defense further argued, "We're just asking about the behaviors of these complaining parties over a specified period of time. We'll let the jury decide whether in that – in that context, it will – makes [sic] easier for them to evaluate their testimony when they do testify."

The defense offered to "back off of trophies." The trial court ruled that he would allow the question if the defense presented to the jury "that there's a study . . . a pattern that . . . victims of sexual crimes behave a certain way." Still outside the presence of the jury, the defense provided the court with the questions "[n]ot about trophies" that would be asked of the same witness.[9] The defense argued that the State did not object to those questions. The trial court stated, "I don't have any problem, if I don't have an objection." Before the jury, the defense asked, without objection, questions on the girls' behaviors. Carnahan's ex-wife responded that they were "normal kids," the older one would mumble when flustered, the "little one would get quite angry" with Carnahan, and they did not have nightmares or hallucinations. Because the defense withdrew the question about trophies, the complaint is not preserved for review. *See* TEX. R. APP. P. 33.1(a)(1).

The Sixth Amendment guarantees a criminal defendant the right to confront the witnesses against him. *See* U.S. Const. amend. VI. The confrontation clause is made applicable to the states by the Fourteenth Amendment. *Shelby v. State*, 819 S.W.2d 544, 546 (Tex. Crim App. 1991)

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[9] The defense stated:

> I was going to ask if the kids seemed to seek thrilling and dangerous activities; if they only knew violent strategies for resolving problems; if they seem to be nervous and ill at ease around adults; if they-were withdrawn and tearful without any reason. And I had asked the question if they had nightmares or hallucinations. And if there is any obvious need for counseling and therapy. I was simply trying to develop whether these were pretty good and well-adjusted kids. And the mother has, typically, said, yes, – you know, has agreed that they're pretty well-adjusted kids, already. I'd like the opportunity to ask the rest of those questions, just so I can have my defense concluded or my cross-exam concluded.

(en banc); *see* U.S. Const. amend. XIV. A primary interest secured by the confrontation clause is the right of cross-examination. *Lopez v. State*, 18 S.W.3d 220, 222 (Tex. Crim. App. 2000). Because cross-examination is a cornerstone of the criminal trial process, a defendant must be given wide latitude to explore a witness's story, to test the witness's recollection of events, and to impeach his or her credibility. *Love v. State*, 861 S.W.2d 899, 904 (Tex. Crim. App. 1993) (en banc). However, the trial court retains wide latitude to impose reasonable limits on cross-examination, based upon concerns about "harassment, prejudice, confusion of issues, the witness's safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1986); *Lopez*, 18 S.W.3d at 222.

Rule 608 of the Texas Rules of Evidence governs admissibility of impeachment evidence. TEX. R. EVID. 608. Rule 608(b) expressly forbids the use of specific instances of conduct to impeach a witness's credibility except to "expose bias or interest, rebut affirmative representations made on direct examination, or to demonstrate a lack of capacity." *Lagrone v. State*, 942 S.W.2d 602, 613 (Tex. Crim. App. 1997) (en banc).[10]

Thus, while the defendant has a constitutional right to confront witnesses, this right is not absolute and the

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[10] Courts have held that if a complainant has made a prior false allegation of sexual assault, in some situations these statements may be admissible even though specific acts of misconduct are generally inadmissible. *See Lopez v. State*, 18 S.W.3d 220, 225-26 (Tex. Crim. App. 1991); *Hughes v. State*, 850 S.W.2d 260, 262-63 (Tex. App.-Fort Worth 1993, pet. ref'd); *Rushton v. State*, 695 S.W.2d 591, 594 (Tex. App.-Corpus Christi 1985, no pet.). The record below contains no evidence of any prior false allegations of sexual abuse.

trial court retains broad discretion to limit cross-examination. *See Thomas v. State*, 137 S.W.3d 792, 797 (Tex. App.-Waco 2004, no pet.) (citing *Carroll v. State*, 916 S.W.2d 494, 498 (Tex. Crim. App. 1996) (en banc)). An abuse of discretion occurs when the trial court acts arbitrarily or unreasonably, without reference to guiding rules or principles. *Montgomery v. State*, 810 S.W.2d 372, 379 (Tex. Crim. App. 1990) (en banc). In other words, an abuse of discretion occurs only when the trial court's decision is so wrong as to lie outside that zone within which reasonable persons might disagree. *Id.* We conclude the trial court did not abuse its discretion in sustaining the State's relevancy objection regarding the girls' achievements because the ruling lies within the zone of reasonable disagreement. *Id.* Even so, the record shows the jury heard some evidence regarding the girls' school achievements and activities.[11] We overrule the sixth issue presented.

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[11] The following colloquy occurred during the defense's cross-examination of the girls' mother:

> [Defense Counsel]: Were they well-skilled young . . . girls? Were they athletic? Did they have certain skills and prowess demonstrated on . . . the field of athletics and in school?
>
> [Mother]: I put them in a lot of activities. . . . I made sure they stayed busy. . . . Yes, they did well. And if they didn't do well, I would re-enforce them and tell them. "Just don't give up. Keep trying. You're doing your best."

On further cross-examination, the following ensued:

> [Defense Counsel]: Did they feel a certain pride of accomplishment when they would do well in school and in athletics?
>
> [Mother]: Absolutely.
>
> [Defense Counsel]: Did they have trophies and achievements?
>
> [Mother]: Yes, they did.

(Continued on following page)

Next, we address Carnahan's complaint that the trial court's ruling limited cross-examination of the younger stepdaughter regarding her sexual history. Carnahan argues that this line of questioning was necessary to rebut medical testimony that a cyst on her leg could have been caused by a sexually transmitted disease. Outside the presence of the jury, the defense argued that the State opened the door to questioning about the younger stepdaughter's sexual history when it elicited this testimony.[12] The trial court instructed the jury to limit its "consideration of that evidence only to show what led to the outcry of the young girl, and not that it was caused by the defendant or anybody else, the cyst."[13] In a prosecution for a sexual offense, reputation or opinion evidence of the past sexual behavior of an alleged victim of such crime is not admissible. *See* TEX. R. EVID. 412(a). Similarly, evidence of specific instances of an alleged victim's past sexual behavior is not admissible unless necessary to rebut or

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In addition, the older stepdaughter testified, during both direct and cross examination, that she graduated as valedictorian from her high school class and received multiple awards and scholarships.

[12] On the State's direct examination, the doctor testified that the younger stepdaughter denied she was sexually active. On further direct examination, when asked if the cyst could have been transmitted by sexual contact and oral contact, the same witness testified, "It's possible."

[13] Article 38.072 of the Texas Code of Criminal Procedure creates an exception to the hearsay rule for statements of child abuse victims if all the requisite conditions are met. *Dorado v. State*, 843 S.W.2d 37, 38 (Tex Crim. App. 1992) (en banc). Article 38.072 provides that, in sexual offense cases committed against a child twelve years of age or younger, statements that were made by the alleged child victim to the first person, eighteen years of age or older, other than the defendant, about the offense will not be inadmissible because of the hearsay rule. TEX. CODE CRIM. PROC. ANN. art. 38.072 (Vernon 2005).

explain medical evidence offered by the State. *See* TEX. R. EVID. 412(b)(2)(A). Ruling outside the presence of the jury, the trial court disallowed the cross-examination of the younger stepdaughter on grounds that the purpose of the evidence was to show that the examination of the cyst led to the child's outcry statement. Subsequently, the trial court gave the jury a limiting instruction. Under Rule 105(a), when evidence is admissible for one purpose, but not another, "the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." TEX. R. EVID. 105(a). We cannot conclude that the trial court's ruling was without reference to guiding rules or principles or outside the zone of reasonable disagreement. *Montgomery*, 810 S.W.2d at 379. We overrule Carnahan's seventh issue.

IV. SUFFICIENCY

By his eighth through twentieth issues, Carnahan argues the evidence was legally and factually insufficient to sustain the convictions for indecency, sexual assault, and aggravated sexual assault.[14] The State responds that the evidence is sufficient.

A. Standards and Scope of Review

1. Legal Sufficiency

A legal-sufficiency challenge requires us to review the relevant evidence in the light most favorable to the verdict, and then to determine whether a rational trier of fact could have found the essential elements of the crime

[14] Carnahan assigns an issue to each count in the indictment.

beyond a reasonable doubt. *Escamilla v. State*, 143 S.W.3d 814, 817 (Tex. Crim. App. 2004) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)); *see also Swearingen v. State*, 101 S.W.3d 89, 95 (Tex. Crim. App. 2003) (en banc); *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000) (en banc). This standard is designed to give "full play to the [jury's] responsibility fairly" to "draw reasonable inferences from basic facts to ultimate facts." *Sanders v. State*, 119 S.W.3d 818, 820 (Tex. Crim. App. 2003). We consider all the evidence that sustains the conviction, whether properly or improperly admitted. *Conner v. State*, 67 S.W.3d 192, 197 (Tex. Crim. App. 2001) (citing *Garcia v. State*, 919 S.W.2d 370, 378 (Tex. Crim. App. 1994) (en banc)). Similarly, we consider all the evidence that sustains the conviction, whether submitted by the prosecution or the defense, in determining the legal sufficiency of the evidence. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000) (en banc); *Cook v. State*, 858 S.W.2d 467, 470 (Tex. Crim. App. 1993) (en banc). In this review, we are not to reevaluate the weight and credibility of the evidence; rather, we act only to ensure that the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993) (en banc).

The legal sufficiency of the evidence is measured against the elements of the offense as defined by a hypothetically correct jury charge for the case. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). This standard of legal sufficiency ensures that a judgment of acquittal is reserved for those situations in which there is an actual failure in the State's proof of the crime, rather than a mere error in the jury charge submitted. *Id.* We then determine if any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Johnson*, 23 S.W.3d at 7.

If we reverse a criminal case for legal insufficiency, we reform the judgment of conviction to reflect conviction for a lesser offense only if a jury charge on the lesser offense was either submitted or requested, but denied. *Collier v. State*, 999 S.W.2d 779, 782 (Tex. Crim. App. 1999). Otherwise, we vacate the judgment of conviction for legal insufficiency and order a judgment of acquittal. *Swearingen*, 101 S.W.3d at 95.

2. Factual Sufficiency

We are constitutionally empowered to review the judgment of the trial court to determine the factual sufficiency of the evidence used to establish the elements of the offense with which Carnahan was charged. *See Johnson*, 23 S.W.3d at 6. The Texas Court of Criminal Appeals has restated the factual sufficiency standard of review:

> There is only one question to be answered in a factual sufficiency review: Considering all of the evidence in a neutral light, was a jury rationally justified in finding guilt beyond a reasonable doubt? However, there are two ways in which the evidence may be insufficient. First, when considered by itself, evidence supporting the verdict may be too weak to support the finding of guilt beyond a reasonable doubt. Second, there may be both evidence supporting the verdict and evidence contrary to the verdict. Weighing all the evidence under this balancing scale, the contrary evidence may be strong enough that the beyond-a-reasonable-doubt standard could not have been met, so the guilty verdict should

> not stand. This standard acknowledges that evidence of guilt can 'preponderate' in favor of conviction but still be insufficient to prove the elements of the crime beyond a reasonable doubt. Stated another way, evidence supporting guilt can 'outweigh' the contrary proof and still be factually insufficient under a beyond-a-reasonable-doubt standard.

Zuniga v. State, 144 S.W.3d 477, 484-85 (Tex. Crim. App. 2004). A clearly wrong and unjust verdict occurs where the jury's finding is "manifestly unjust," "shocks the conscience," or "clearly demonstrates bias." *Prible v. State*, No. AP-74,487, 2005 Tex. Crim. App. LEXIS 110, at *16-*17 (Tex. Crim. App. January 26, 2005) (designated for publication).

When the State bears the burden of proof, the proof of guilt is factually insufficient if it is so obviously weak as to indicate that a manifest injustice has occurred or if it is greatly outweighed by contrary proof. *Zuliani v. State*, 97 S.W.3d 589, 593-94 (Tex. Crim. App. 2003). In determining the factual sufficiency of the elements of the offense, we view all the evidence neutrally, not through the prism of "the light most favorable to the prosecution." *Johnson*, 23 S.W.3d at 6-7 (citing *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996)). However, we approach a factual-sufficiency review with appropriate deference to avoid substituting our judgment for that of the fact finder. *Id.* Our evaluation should not intrude substantially on the fact finder's role as the sole judge of the weight and credibility given to witness testimony. *Id.* We must consider the most important evidence that the appellant claims undermines the jury's verdict. *Sims v. State*, 99 S.W.3d 600, 603 (Tex. Crim. App. 2003).

Every fact need not point directly and independently to the accused's guilt. *Vanderbilt v. State*, 629 S.W.2d 709, 716 (Tex. Crim. App. 1981). A conclusion of guilt can rest on the combined and cumulative force of all the incriminating circumstances. *Id.* We reverse a judgment of conviction only if proof of guilt is so obviously weak and manifestly unjust or the contrary evidence is so strong that the standard of proof beyond a reasonable doubt could not have been met. *Prible*, 2005 Tex. Crim. App. LEXIS 110, at *16-*17.

In conducting a factual sufficiency review, we review all the evidence. *Cain v. State*, 958 S.W.2d 404, 408 (Tex. Crim. App. 1997). In the opinion, we "show our work" when we consider and address the appellant's main argument for urging insufficiency of the evidence. *See* Tex. R. App. P. 47.1; *Sims*, 99 S.W.3d at 603 ("A proper factual sufficiency review must include a discussion of the most important and relevant evidence that supports the appellant's complaint on appeal."). This practice benefits the parties, maintains the integrity of the justice system, and improves appellate practice. *Id.*

If we reverse a criminal case for factual insufficiency, we vacate the judgment of conviction. *Clewis*, 922 S.W.2d at 133-34. We remand for a new trial a criminal case reversed for factual insufficiency so a second jury may have the chance to evaluate the evidence. *Swearingen*, 101 S.W.3d at 97.

3. General Verdict

When the indictment alleges alternate theories of committing the same offense, it is proper for the jury to be charged in the disjunctive and to return a general verdict of guilty. TEX. CODE CRIM. PROC. ANN. art. 37.07,

§ 1(a) (Vernon Supp. 2004-05) (verdict must be general); *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991) (en banc). The conviction will be upheld if the evidence is sufficient to support a finding of guilt under any one of the theories submitted. *Kitchens*, 823 S.W.2d at 258; *see Aguirre v. State*, 732 S.W.2d 320, 326 (Tex. Crim. App. 1987) (en banc); *Yandell v. State*, 46 S.W.3d 357, 363 (Tex. App.-Austin 2001, pet. ref'd).

4. Testimony of a Child in Sexual Conduct Cases

The testimony of a child sexual abuse victim alone is sufficient to support a conviction for aggravated sexual assault. TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon 2005); *see Garcia v. State*, 563 S.W.2d 925, 928 (Tex. Crim. App. 1978). Courts give wide latitude to testimony given by child victims of sexual abuse. *See Villalon v. State*, 791 S.W.2d 130, 134 (Tex. Crim. App. 1990) (en banc). The victim's description of what happened to her need not be precise, and she is not expected to express herself at the same level of sophistication as an adult. *See id.* There is no requirement that the victim's testimony be corroborated by medical or physical evidence. *Garcia*, 563 S.W.2d at 928; *Kemple v. State*, 725 S.W.2d 483, 485 (Tex. App.-Corpus Christi 1987, no writ).

B. The Hypothetically Court [sic] Charge

A hypothetically correct charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or restrict its theories of liability, and adequately describes the particular offense. *Malik*, 953 S.W.2d at 240; *Cano v. State*,

3 S.W.3d 99, 105 (Tex. App.-Corpus Christi 1999, pet. ref'd). A hypothetically correct jury charge does not simply quote from the controlling statute. *Gollihar v. State*, 46 S.W.3d 243, 254 (Tex. Crim. App. 2001). Its scope is limited by the statutory elements of the offense as modified by the charging instrument. *See Fuller v. State*, 73 S.W.3d 250, 254 (Tex. Crim. App. 2002) (Keller, P.J., concurring) (quoting *Curry v. State*, 30 S.W.3d 394, 404 (Tex. Crim. App. 2000)). *Malik* flatly rejects use of the jury charge actually given as a means of measuring sufficiency of the evidence. *See Gollihar*, 46 S.W.3d at 252. *Malik* controls sufficiency of the evidence analysis even in the absence of alleged jury charge error. *Id.* at 255.

C. The Law Applicable to the Indecency-with-a-Child Counts

1. Counts 1, 4 and 5

The statutory period of limitation for indecency with a child is ten years from the child's eighteenth birthday. TEX. CODE CRIM. PROC. ANN. art. 12.01(5)(A) (Vernon 2005). The indictment alleged various sexual offenses against Carnahan's minor stepdaughters. Count 1 alleged indecency with the older stepdaughter on or about November 1, 1993 by touching her genitals. Counts 4 and 5 alleged indecency with the younger stepdaughter on or about October 1, 1995, and October 1, 1996, respectively, by touching her genitals. *See* Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 1.01, sec. 21.11, 1993 Tex. Gen. Laws 3586, 3616, *amended by* Act of May 23, 2001, 77th Leg., R.S., ch. 739, 2001 Tex. Gen. Laws 1463, 1464 (current version at TEX. PEN. CODE ANN. § 21.11(a)(1) (Vernon 2003)).

2. "On or About" Allegation of Date of Offense

Unless the date is a material element of an offense, it is not necessary for an indictment to specify the precise date on which the charged offense occurred. *See Garcia v. State*, 981 S.W.2d 683, 685-86 (Tex. Crim. App. 1998) (en banc). The primary purpose of specifying a date in the indictment is not to notify the accused of the date of the offense. *Id.* at 686. Rather, the purpose of providing a date is to show that the prosecution is not barred by the statute of limitation. *Id.* When an indictment alleges that a crime occurred "on or about" a certain date, the State may prove an offense "with a date other than the one specifically alleged so long as the date is anterior to the presentment of the indictment and within the statutory limitation period and the offense relied upon otherwise meets the description of the offense contained in the indictment." *Yzaguirre v. State*, 957 S.W.2d 38, 39 (Tex. Crim. App. 1997) (en banc) (quoting *Sledge v. State*, 953 S.W.2d 253, 256-57 (Tex. Crim. App. 1997) (en banc)). Accordingly, the hypothetically correct jury charge in this case would instruct the jury that the State could prove that the charged offenses were committed before, on, or after the dates alleged in the indictment so long as the dates were before the date of the indictment and within the applicable limitation period. *Mireles v. State*, 901 S.W.2d 458, 459 (Tex. Crim. App. 1995) (en banc); *DeMoss v. State*, 12 S.W.3d 553, 560 (Tex. App.-San Antonio 1999, pet. ref'd).[15]

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[15] Moreover, where the record establishes numerous sexual contacts between an accused and a victim, a jury rationally may infer that an offense was committed "on or about" a particular date without the benefit of a jury instruction on the definition of "on or about."

(Continued on following page)

3. The Elements of Indecency with a Child as Limited by the Indictment

Thus, the hypothetically correct jury charge against which we measure legal sufficiency in Count 1 of the indictment in this case would ask the jury if Carnahan (1) on or about November 1, 1993, (2) intentionally or knowingly (3) engaged in sexual contact (4) with the older stepdaughter, who was then a child under 17 years old and not his spouse, (5) by touching her genitals. For Counts 4 and 5 involving the younger stepdaughter, the hypothetically correct jury charge would contain the same elements, alleged to have occurred on or about October 1, 1995, and October 1, 1996. We turn to the relevant definitions.

4. Definitions Used in the Indecency-with-a-Child Statute

The penal code defines "sexual contact" as "any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person." TEX. PEN. CODE ANN. § 43.01 (Vernon 2003). The offense of indecency with a child requires proof of the accused's intent to engage in the proscribed contact rather than an intent to bring about any particular result. *Rodriguez v. State*, 24 S.W.3d 499, 502 (Tex. App.-Corpus Christi 2000, pet. ref'd). Thus, the definitions in the hypothetically correct jury charge in this case concerning the applicable culpable mental state for the indecency-with-a-child counts would be limited to the

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Mireles v. State, 901 S.W.2d 458, 459 (Tex. Crim. App. 1995) (en banc); *see also Hoffman v. State*, 922 S.W.2d 663, 672 (Tex. App.-Waco 1996, pet. ref'd).

nature of the conduct, rather than the result of conduct or circumstances surrounding the conduct.

A person acts intentionally, or with intent, with respect to the nature of the conduct or a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result. TEX. PEN. CODE ANN. § 6.03(a) (Vernon 2003). Similarly, a person acts knowingly, or with knowledge, with respect to the nature of conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. TEX. PEN. CODE ANN. § 6.03(b) (Vernon 2003). A fact finder may infer the accused's mental state from the acts, words, and conduct of the accused and from the circumstances surrounding the acts in which the accused engaged. *See Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991) (en banc); *Dillon v. State*, 574 S.W.2d 92, 94 (Tex. Crim. App. [Panel Op.] 1978). An accused rarely facilitates conviction by admitting to the requisite intent or knowledge, and it is seldom possible to prove by direct evidence what an accused intended or knew at the time of the incident. Thus, the fact finder usually must infer intent and knowledge from circumstantial evidence rather than direct proof. *See Gardner v. State*, 736 S.W.2d 179, 182 (Tex. App.-Dallas 1987), *aff'd*, 780 S.W.2d 259 (Tex. Crim. App. 1989); *see also Hernandez*, 819 S.W.2d at 810; *Dillon*, 574 S.W.2d at 94-95.

Specifically, the fact finder can infer the requisite intent to arouse or gratify the sexual desire of a person from conduct, remarks, or all the surrounding circumstances. *Robertson v. State*, 871 S.W.2d 701, 705 (Tex. Crim. App. 1993); *McKenzie v. State*, 617 S.W.2d 211, 216 (Tex. Crim. App. 1981). The intent to arouse or gratify may

be inferred from conduct alone. *McKenzie*, 617 S.W.2d at 216. No oral expression of intent is necessary. *Id.*; *Gregory v. State*, 56 S.W.3d 164, 171 (Tex. App.-Houston [14th Dist.] 2001, pet. granted). Nor is visible evidence of sexual arousal required. *McKenzie*, 617 S.W.2d at 216; *Gregory*, 56 S.W.3d at 171. Further, the fact finder may draw an inference of guilt from the accused's acts, words, and conduct before, during, and after the incident. *See Foster v. State*, 779 S.W.2d 845, 859 (Tex. Crim. App. 1989) (en banc) (inference of guilt may be drawn from flight).

D. The Law Applicable to the Aggravated-Sexual-Assault-of-a-Child Counts

1. Counts 2, 3, 6, 7, and 8

The statutory period of limitation for aggravated sexual assault of a child is ten years from the child's eighteenth birthday. TEX. CODE CRIM. PROC. ANN. art. 12.01(5)(B) (Vernon 2005). Counts 2 and 3 of the indictment alleged that Carnahan intentionally and knowingly caused digital penetration of the older stepdaughter's sexual organ on or about March 1 and November 1, 1994, respectively. Counts 6, 7, and 8 alleged that Carnahan intentionally and knowingly committed aggravated sexual assault of the younger stepdaughter by (1) genital-to-genital contact on or about March 1, 1997, (2) genital-to-mouth contact on or about October 1, 1997, and (3) digital penetration on or about March 1, 1998.

2. The Elements of Aggravated Sexual Assault of a Child

Thus, the hypothetically correct jury charge against which we measure legal sufficiency in Counts 2, 3, and 8 of

the indictment would ask the jury if Carnahan (1) on or about the alleged dates, (2) intentionally or knowingly, (3) caused penetration of the sexual organ, (4) of each of the stepdaughters, who were then children under 14 years old and not married to him, (5) by any means. *See* Act of May 26, 1999, 76th Leg., R.S., ch. 417, § 2, 1999 Tex. Gen. Laws 2752, 2753, *amended by* Act of May 15, 2001, 77th Leg., R.S., ch. 459, § 5 (current version at TEX. PEN. CODE ANN. § 22.021(a)(1)(B)(i) (Vernon Supp. 2004-05)). As to Count 6 of the indictment, the hypothetically correct jury charge would ask the jury if Carnahan (1) on or about March 1, 1997, (2) intentionally or knowingly (3) caused the sexual organ (4) of the younger stepdaughter, who was then a child under 14 years old and not his spouse, (5) to contact (6) his sexual organ. *See* Act of May 26, 1999, 76th Leg., R.S., ch. 417, § 2, 1999 Tex. Gen. Laws 2752, 2753, *amended by* Act of May 15, 2001, 77th Leg., R.S., ch. 459, § 5 (current version at TEX. PEN. CODE ANN. § 22.021(a)(1)(B)(iii) (Vernon Supp. 2004-05)). As to Count 7, the hypothetically correct jury charge would ask the jury if Carnahan (1) on or about October 1, 1997, (2) intentionally or knowingly (3) caused the sexual organ (4) of the younger stepdaughter, who was then a child under 14 years old and not his spouse, (5) to contact (6) his mouth. *See* Act of May 26, 1999, 76th Leg., R.S., ch. 417, § 2, 1999 Tex. Gen. Laws 2752, 2753 (amended 2001). We turn to additional relevant definitions.

3. Definitions Used in the Aggravated-Sexual-Assault-of-a-Child Statute

The Texas Court of Criminal Appeals has not addressed whether aggravated sexual assault of a child is a nature-of-conduct, result-of-conduct, or combined offense.

See Baker v. State, 94 S.W.3d 684, 691 (Tex. App.-Eastland 2002, no pet.); *see also Cook*, 884 S.W.2d at 492-94 (Maloney, J., concurring); *Duhart v. State*, 890 S.W.2d 187, 191 (Tex. App.-Corpus Christi 1994, no pet.); *Murray v. State*, 804 S.W.2d 279, 281 (Tex. App.-Fort Worth 1991, pet. ref'd). Where an offense is not clearly categorized with respect to the conduct elements, the trial court may submit to the jury the full statutory definitions of "intentionally" and "knowingly" because both definitions allow the jury to consider the nature of the accused's conduct or the results of the conduct. *Baker*, 94 S.W.3d at 691 (citing *Murray*, 804 S.W.2d at 281).

E. The Law Applicable to the Sexual-Assault-of-a-Child Counts

1. Counts 9, 10, 11, 12, and 13

The statutory period of limitation for sexual assault of a child is also ten years from the child's eighteenth birthday. TEX. CODE CRIM. PROC. ANN. art. 12.01(5)(B) (Vernon 2005). Counts 9, 10, 11, 12 and 13 alleged that Carnahan intentionally and knowingly sexually assaulted the younger stepdaughter by (1) genital-to-mouth contact on or about October 1, 1998, (2) digital penetration on or about March 1, 1999, (3) genital-to-mouth contact on or about October 1, 1999, (4) digital penetration on or about March 1, 2000, and (5) genital-to-mouth contact on or about October 1, 2000, respectively.

2. The Elements of Sexual Assault of a Child

Thus, the hypothetically correct jury charge against which we measure legal sufficiency in Counts 9, 11, and 13

of the indictment would ask the jury if Carnahan (1) on or about the alleged dates (2) intentionally or knowingly (3) caused the sexual organ (4) of the younger stepdaughter, who was then a child under 14 years old and not his spouse, (5) to contact the mouth by any means. *See* TEX. PEN. CODE ANN. § 22.011(a)(2)(C) (Vernon Supp. 2004-05). As to Counts 10 and 12, the hypothetically correct jury charge would ask if Carnahan (1) on or about the alleged dates (2) intentionally or knowingly (3) caused penetration of the sexual organ (4) of the younger stepdaughter, who was then a child under 14 years old and not his spouse, (5) by any means. *See* TEX. PEN. CODE ANN. § 22.011(a)(2)(A) (Vernon Supp. 2004-05).

3. Definitions Used in the Sexual-Assault-of-a-Child Statute

Three "conduct elements" can be involved in an offense: (1) nature of the conduct, (2) result of the conduct, and (3) circumstances surrounding the conduct. *McQueen v. State*, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989) (en banc). A particular offense may contain one or more of these conduct elements. *Id.* Whether sexual assault of a child is a nature-of-conduct, result-of-conduct, or combined offense is unsettled. We conclude that until the Texas Court of Criminal Appeals classifies sexual assault as a result-oriented crime, a nature-of-the-conduct offense, or a combination, "it is not error for the trial court to submit the statutory definitions of 'intentionally' and 'knowingly' because both definitions allow the jury to consider the nature of [an] offender's conduct or the results of his conduct." *Saldivar v. State*, 783 S.W.2d 265, 267 (Tex. App.-Corpus Christi 1989, no pet.); *see also Cook*, 884 S.W.2d at 492-94.

F. The Evidence at Trial

Carnahan married the girls' mother in May 1993, when the girls were about nine and ten years old. The older stepdaughter was born on January 1, 1983. The younger one was born on April 29, 1984. At the time of the marriage, Carnahan moved into the townhome where the girls were living with their mother. Allegations of sexual contact arose after the younger stepdaughter told a neighbor, during the summer of 2001, that Carnahan had molested her for the last six years.[16] From the neighbor, the jury heard that the younger stepdaughter told her Carnahan attempted intercourse with her when she was in the fourth grade. The girls' mother confirmed the outcry from the younger stepdaughter and asked the older stepdaughter about sexual contact by Carnahan. The older stepdaughter confirmed it had occurred.

The older stepdaughter testified she was nine or ten years old and in the fourth grade when her mother began dating Carnahan. Molestation began a few months after the marriage in 1993. She described for the jury sexual contact and multiple acts of sexual contact by Carnahan.[17]

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[16] The neighbor was a nurse who examined, at the younger stepdaughter's request, a cyst on the younger stepdaughter's leg. She also testified that she saw Carnahan exit the residence in his underwear to retrieve the newspaper several times over a five-year period, observed him touch a teenage girl's backside, heard him comment inappropriately about another teenage girl's attire in the presence of his stepdaughters, and heard him make an inappropriate comment about a teenage girl's backside.

[17] The older stepdaughter's testimony included incidences of contact between her sexual organ and Carnahan's fingers, including penetration. On cross-examination, she testified as to the dates of the offenses for Counts 1, 2, and 3, the indicted offenses pertaining to contact and conduct against her.

She testified that the contacts and conduct occurred enough that she dreaded weekends at home and looked forward to Mondays and school. The contact stopped when she reached the sixth grade, when she was twelve years old.[18]

The younger child described for the jury years of sexual contact and multiple acts of sexual conduct by Carnahan, spanning from 1995 through 2001.[19] The incidents began in the fall of 1995 when she was in the fifth or sixth grade and stopped the summer of her senior year in high school.

Admitted in evidence was a letter Carnahan sent the girls' mother, which stated, in part, "If you really want to know about [the younger stepdaughter], she is not at all what you believe. There was very little touching, but every bit of it was by her inducement and request" (underlining in original). Both girls testified about marital discord between Carnahan and their mother. They denied telling their mother about the incidents prior to the younger stepdaughter's outcry. The jury heard that their mother pursued divorce proceedings the day after the outcry.

Two defense witnesses testified that social visits with Carnahan and his stepdaughters revealed normal interaction between them, but marital problems existed between Carnahan and the girls' mother. Carnahan testified in his

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[18] She testified that, after that, Carnahan would press against her backside, enough that she could feel his sexual organ.

[19] Her testimony included descriptions of contact involving Carnahan's touching her sexual organ with his hands and mouth, attempting sexual intercourse, and digital penetration.

own defense. He told the jury that the younger stepdaughter asked him to look at a cyst on her leg because she was aware of his "pre-med" background. He viewed the cyst, in his wife's presence, and explained to the younger stepdaughter that the bump was a swollen lymph node. He checked the cyst daily. He denied that his checking the cyst led to sexual contact.

Carnahan denied the charges. He admitted writing the letter to the girls' mother, explaining that he wrote it because he was contemplating suicide after receiving news of his indictment. He related to the jury that he gave the girls rubdowns at their request because their muscles hurt, but "it sure wasn't anything sexual. It was a chore, a monotonous chore, almost daily." He described numerous incidents regarding such contact.[20] He admitted fleeing to Costa Rica pending trial.

F. Sufficiency Analyses

With a hypothetically correct jury charge in mind that reflects definitions and the elements of the offenses, we turn to the legal and factual sufficiency analyses of the evidence to support the convictions for indecency, aggravated assault, and sexual assault of a child.

1. Elements Common to the Charged Offenses

As an initial matter, we conclude that, viewed under the legal and sufficiency standards, the evidence

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[20] His testimony included descriptions of accidental touching of the younger stepdaughter's breasts once and her sexual organ once when he changed the gauze in the area of the cyst after its surgical removal.

conclusively established that (1) the stepdaughters were under the age of seventeen years and not married to Carnahan, and (2) the offenses occurred in Nueces County, Texas. The offenses proved by the State conformed with the allegations in the indictment, were within the statute of limitation, and occurred before the date of the indictment. *See Yzaguirre*, 957 S.W.2d at 39. The State was not required to prove that any particular offense occurred on any particular date. *See Mireles*, 901 S.W.2d at 459. Viewing the evidence under the appropriate legal and factual sufficiency standards, we conclude that any rational trier of fact could have found beyond a reasonable doubt that Carnahan committed the offenses charged in the indictment on dates prior to the date of the indictment and within the limitation period. *See Jackson*, 443 U.S. at 319; *Johnson*, 23 S.W.3d at 7; *Zuniga*, 144 S.W.3d at 484-85.

2. The Older Stepdaughter

Count 1 charged Carnahan with indecency with a child against the older stepdaughter. Counts 2 and 3 charged him with aggravated sexual assault. The evidence showed that, shortly after he married the girls' mother, Carnahan began molesting the older stepdaughter when she was about nine years old. He continued until she was twelve. The abuse began with Carnahan's touching her sexual organ and escalated to digital penetration. Carnahan denied sexual contact and conduct.

3. The Younger Stepdaughter

As to the younger stepdaughter, the indictment charged Carnahan as follows:

(1) indecency with a child, Counts 4 and 5; (2) aggravated sexual assault of a child, Counts 6, 7, and 8; and (3) sexual assault of a child, Counts 9, 10, 11, 12, and 13. The younger stepdaughter testified of numerous instances of sexual conduct and contact by Carnahan. Carnahan admitted to touching her breasts and sexual organ on separate occasions but claimed he did so accidentally. In his letter to the girls' mother, he admitted "[t]here was very little touching, but every bit of it was by [the younger daughter's] inducement and request" (underlining in original).

4. Disposition

The jury was free to resolve conflicts in testimony. *See Mosley v. State*, 983 S.W.2d 249, 254 (Tex. Crim. App. 1998) (en banc) (questions concerning the credibility of witnesses and the weight to be given their testimony are to be resolved by the trier of fact); *see also Esquivel v. State*, 506 S.W.2d 613, 615 (Tex. Crim. App. 1974). Evidence is not rendered insufficient when conflicting evidence is introduced. *Matchett v. State*, 941 S.W.2d 922, 936 (Tex. Crim. App. 1996) (en banc). The reviewing court must assume that the fact finder resolved the conflicts, including conflicting inferences, in favor of the verdict, and must defer to that resolution. *Id.* Further, the fact finder may draw an inference of guilt from the accused's acts, words, and conduct before, during, and after the incident. *See Foster*, 779 S.W.2d at 859 (inference of guilt may be drawn from flight).

We are mindful that a child's description of sexual contact is sufficient evidence from which a fact finder may infer the intent-to-gratify element of indecency with a child. *See, e.g., McKenzie*, 617 S.W.2d at 216; *Brown v.*

State, 871 S.W.2d 852, 856 (Tex. App.-Corpus Christi 1994, pet. ref'd). The jury heard the stepdaughters' descriptions of sexual conduct and contact and heard Carnahan's denial. By its verdict, the jury rejected Carnahan's claim of innocence. By evidence of flight, the jury was free to infer guilt. *See Foster*, 779 S.W.2d at 859.

Viewing the evidence in the light most favorable to the verdict and in a neutral light, we conclude that any rational trier of fact could have found beyond a reasonable doubt the intent-to-gratify elements of indecency with a child. *See Jackson*, 443 U.S. at 319; *see also Johnson*, 23 S.W.3d at 7; *Zuniga*, 144 S.W.3d at 484-85. Viewing the evidence in the light most favorable to the verdict, we conclude that any rational trier of fact could have found beyond a reasonable doubt that Carnahan engaged in sexual contact with the older stepdaughter by touching her sexual organ and by digital penetration. *See Jackson*, 443 U.S. at 319; *Malik*, 953 S.W.2d at 240. The evidence is legally sufficient. Furthermore, viewing all of the evidence in a neutral light, we conclude that the evidence supporting the verdict is not too weak to support the jury's finding of guilt beyond a reasonable doubt; nor is the weight of the evidence contrary to the verdict strong enough that the State could not have met its burden of proof. *Zuniga*, 144 S.W.3d at 484-85. The evidence is factually sufficient.

As to the younger daughter, viewing the evidence in the light most favorable to the verdict, we conclude that any rational trier of fact could have found beyond a reasonable doubt that Carnahan engaged in sexual contact with the younger stepdaughter by (1) contact with her sexual organ (Counts 4 and 5), (2) genital-to-genital contact (Count 6), (3) genital-to-mouth contact (Counts 7, 9, 11, and 13), and (4) digital penetration (Counts 8 and

10). *See Jackson*, 443 U.S. at 319; *Malik*, 953 S.W.2d at 240. The evidence is legally sufficient. Furthermore, viewing all of the evidence in a neutral light, we conclude that the evidence supporting the verdict is not too weak to support the jury's finding of guilt beyond a reasonable doubt; nor is the weight of the evidence contrary to the verdict strong enough that the State could not have met its burden of proof. *Zuniga*, 144 S.W.3d at 484-85. The evidence is factually sufficient.

Thus, as to the older stepdaughter, we conclude the evidence was legally and factually sufficient to sustain Carnahan's convictions for indecency with a child and aggravated sexual assault as alleged in Counts 1, 2, and 3 of the indictment. We overrule Carnahan's eighth, ninth, and tenth issues presented.

As to the younger stepdaughter, viewing the evidence under the legal and factual sufficiency standards, we similarly conclude that the evidence was legally and factually sufficient to sustain Carnahan's convictions for indecency with a child, aggravated sexual assault, and sexual assault as alleged in Counts 4 through 13 of the indictment. We overrule Carnahan's eleventh through twentieth issues presented.

V. FORFEITURE OF ERROR ON APPEAL

As a prerequisite to presenting a complaint for appellate review, the record must show that the appellant made the complaint to the trial court. *See* TEX. R. APP. P. 33.1. As to Carnahan's remaining issues, for the reasons set forth below, we conclude he forfeited error because the issues were not raised before the trial court.

A. Competency to Stand Trial

By his twenty-first issue, Carnahan argues that he could not be sentenced because he was denied his right to the determination of competency to stand trial.[21] Carnahan did not object at trial to imposition of the sentence. During the motion for new trial hearing, his objection was generally that he was denied a competency hearing. We conclude that he forfeited his right to complain because (1) he did not present the complaint to the trial court, and (2) the general objection during the motion for new trial phase does not comport with his current argument. *See Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002). We overrule Carnahan's twenty-first issue.

B. Cruel and Unusual Punishment

By his twenty-second issue, Carnahan argues that the sentence amounts to cruel and unusual punishment and/or grossly disproportionate punishment. Prior to sentencing, Carnahan did not object to the imposition of the sentence on the basis that he was incompetent to stand trial. At the motion for new trial hearing, Carnahan did not argue his present complaint to the trial court. Because the objections asserted now do not comport with those uttered below, the issue before us was not preserved for review. *See Wilson*, 71 S.W.3d at 349. He has forfeited his right to complain. We overrule his twenty-second issue.

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[21] Carnahan's trial attorneys decided not to proceed with the competency issue. Carnahan testified at trial. He answered questions posed to him with particularity. The record does not show that Carnahan marshaled evidence to support his claim of incompetency.

C. Inflammatory Evidence During the Culpability Phase

By his twenty-third issue, Carnahan argues that the State's evidence was inflammatory and calculated to cause the jury to render an excessive sentence. The record shows that the defense objected to the testimony of the neighbor, also a nurse, who examined the younger daughter's cyst. The basis of the objection was that the witness was not qualified as an expert to testify about the effect of the sexual conduct and contact upon the family. The trial court sustained the objection. As a general rule, to preserve error for appellate review, Carnahan must have made a timely, specific objection, at the earliest opportunity, and obtained an adverse ruling. TEX. R. APP. P. 33.1; *Turner v. State*, 805 S.W.2d 423, 431 (Tex. Crim. App. 1991). As to his complaint regarding the nurse, Carnahan has not shown an adverse ruling. Further, Carnahan did not present his complaint regarding the remaining witnesses. Thus, he has forfeited his right to complain. We overrule his twenty-third issue.

D. Constitutional Right to a Fair Trial

By his twenty-fourth issue, Carnahan argues that the trial court denied him his state and federal right to a fair trial when it granted the State's motion to quash his subpoenas to six jurors. The subpoenas were issued to secure the testimony of the jurors at the motion for new trial hearing on grounds of juror misconduct. Carnahan did not present his constitutional arguments to the trial court. Thus, he forfeited his right to complain. We overrule his twenty-fourth issue.

VI. CONCLUSION

We have reviewed, as we must, Carnahan's twenty-four issues under the applicable appellate standards of review. We have overruled all his issues presented. We affirm.

ERRLINDA CASTILLO

Justice

LOGO

Welcome To The
Thirteenth Court Of Appeals

Case # 13-03-00155-CR - > Event: Petition for Discretionary Review Filed

Event Information:

Event Type:	Petition for Discretionary Review Filed
Description:	Appellant
Date:	10/6/2005
Disposition:	
Opinion Written:	

LOGO

Welcome To The
Texas Judiciary Online
Court of Criminal Appeals

Case # PD-1251-05 - > Event: PDR DISP

Event Information:

Event Type:	PDR DISP
Description:	Appellant
Date:	1/18/2006
Disposition:	Refused
Opinion Written:	

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NO. 01 CR 3833 H(S1)

STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
vs.	§	347th JUDICIAL DISTRICT
	§	
ROBERT NARVELL CARNAHAN	§	NUECES COUNTY, TEXAS
	§	

AFFIDAVIT OF CATHERINE D'UNGER

BEFORE ME, the undersigned authority, on this the 10th day of February, 2002, appeared before me Catherine D'Unger, who, upon her oath, stated the following:

"My name is Catherine D'Unger. I am over the age of twenty-one, have never been convicted of a felony and am fully qualified to make this affidavit.

I am a private investigator, accused by the State of Texas. In July of 2002, I was retained by Mike Carnahan, the son of Defendant Robert Carnahan to assist him in the closing out of Robert Carnahan's bank accounts, his office and other items.

When Robert Carnahan retained Grant Jones to represent him in August of 2002, Mr. Jones asked me to assist him in his capacity as an investigator. I agreed and was retained.

Since I first met Robert Carnahan, I have been concerned about his health, and I repeatedly requested that he put in a request at the Nueces County Jail to see a medical doctor. I started to see in Mr. Carnahan various signs that indicated he was having circulatory problems. At times certain areas of his body, such as under his fingernails and his lips would be of a bluish color a further indicating [sic] to me that he was suffering some sort of

physical ailment. He would often be subject to uncontrollable, long bouts of coughing. It was very difficult to get information from him since I could not keep him on one subject for any length of time.

After the guilty verdict had been returned on January 9, 2003, I was shocked to find out that Mr. Carnahan had been treated for cancer and various heart problems. Had it been know [sic], it would have been presented as evidence. I went to Christus Spohn Shoreline Hospital to get his medical records by virtue of a subpoena which had been requested by Mr. Jones. In my experience as an investigator I have routinely obtained subpoenas for medical records in various litigation cases, including both civil and criminal and that often various diagnoses or other medical findings are clearly and succinctly typed. That was the case with Robert Carnahan's medical records. I noticed right away that he had undergone extensive treatment for cancer and heart disease.

From my personal experience and based upon my observation of various relatives which have undergone similar types of treatment, it is my belief and opinion, based upon my experience as an investigator and my own knowledge of these types of illnesses, which was really focused by me when I viewed his medical records, that Mr. Carnahan's medical history would be consistent with his not being able to think clearly and would have adversely effected his memory. It was clearly obvious from my observation that when I first started seeing him in August, 2002, he should have been examined by a medical doctor. When I saw the records from Spohn Hospital, I could then clearly realize why it had been difficult for me to obtain information from him."

/s/ Catherine D'Unger
CATHERINE D'UNGER

SWORN TO by the said Catherine D'Unger before me, on this 10th day of February, 2003.

/s/ Lazaro Lujan, III
Notary Public, State of Texas

[SEAL] LAZARO LUJAN III
Notary Public
State of Texas
My Comm. Exp. 03-22-2006